
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

v.

LILLIAN E. YAEGER,

Respondent

EMMA M. HEBER AND ESTATE OF HENRY D. HEBER, DECEASED,
EMMA M. HEBER, ADMINISTRATRIX,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

REPLY BRIEF FOR THE COMMISSIONER AS PETITIONER

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IN THE UNITED STATES COURT OF APPEALS

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No. 20085

COMMISSIONER OF INTERNAL REVENUE,

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v.

LILLIAN E. YAEGER,

Respondent

No. 20086

EMMA M. HEBER AND ESTATE OF HENRY D. HEBER, DECEASED,
EMMA M. HEBER, ADMINISTRATRIX,

Petitioners

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COMMISSIONER OF INTERNAL REVENUE,

Respondent

REPLY BRIEF FOR THE COMMISSIONER AS PETITIONER

The Commissioner's principal contentions--that Mrs. Heber's share rental income from the Fullerton properties, which she received in 1956 through 1958, is taxable as ordinary income rather than as capital income--and the Commissioner's alternative argument--that, if this Court reverses the Tax Court on Mrs. Heber's appeal, the Tax Court should also be reversed on the Commissioner's appeal against Miss Yaeger--have been fully set forth in our main brief (pp. 18-29).

In the brief filed on behalf of Miss Yaeger, however, an argument was advanced (Br. 25-29) that the Tax Court should have allowed

deductions to Miss Yaeger in 1955 and 1957 in the amounts of \$9,086.39 and \$3,766.32, respectively. Miss Yaeger raised the question of these deductions in her petition to the Tax Court (I-R. 2), but thereafter failed to discuss the issue in any pleadings or briefs before the Tax Court. Consequently, the Tax Court in its opinion stated (I-R. 74):

Since Yaeger has made no argument on brief concerning respondent's disallowance of the deductions she claimed during the years 1955 and 1957 for payments made by her to Heber in the respective amounts of \$9,086.39 and \$3,766.32, pursuant to the judgment in Steeve v. Yaeger, supra, we conclude that she has abandoned this issue.

Thereafter, Miss Yaeger filed no motions for reconsideration or to amend, and her counsel agreed to the computation for entry of decision. (I-R. 37.) She filed no petition for review of the issue with this Court.

It therefore appears that counsel for Miss Yaeger was negligent in not pursuing in the Tax Court her claim with respect to these deductions. ^{*/} However, the Commissioner concedes that the deductions should be allowed to Miss Yaeger on the basis of the Tax Court's opinion. The reason they were not allowed in the computation for entry of decision is that there was some doubt as to the propriety of such a procedure in view of that part of the Tax Court's opinion regarding abandonment

*/ Shedd's Estate v. Commissioner, 320 F. 2d 638 (C.A. 9th); Inman-Poulsen Lumber Co. v. Commissioner, 219 F. 2d 159 (C.A. 9th); United States v. Waechter, 195 F. 2d 963 (C.A. 9th); Schoenfeld v. Commissioner, 103 F. 2d 964 (C.A. 9th); Kottemann v. Commissioner, 81 F. 2d 621 (C.A. 9th); Ernest Holdeman & Collect, Inc. v. Commissioner, 290 F. 2d 3 (C.A. 7th); Kamen Soap Products Co. v. Commissioner, 230 F. 2d 565 (C.A. 2d); McDonald v. Commissioner, 214 F. 2d 341 (C.A. 2d); Yiannias v. Commissioner, 180 F. 2d 115 (C.A. 8th); Home Furniture Co. v. Commissioner, 168 F. 2d 312 (C.A. 4th); Commissioner v. Josephs, 168 F. 2d 233 (C.A. 8th).

of the deduction issue. To prevent a miscarriage of justice, we suggest that, in the event this Court affirms the Tax Court's decision in the Heber case, the Yaeger case should be remanded for modification of the Tax Court's decision.

Respectfully submitted,

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JANUARY, 1966.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1966.

CAROLYN R. JUST
Attorney.

